

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CARLOS IVÁN VELÁZQUEZ-DE-JESÚS; GLORILY BARROSO-MUÑOZ; GIAN CARLOS VELÁZQUEZ-BARROSO; GLORIANA VELÁZQUEZ-BARROSO; UBALDO VELÁZQUEZ-RIVERA,

CIVIL 07-1393 (ADC)

v.

SGT. LESLIE ZENO-SANTIAGO,

Defendant

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter is before the court on defendant Leslie Zeno-Santiago's motion to dismiss for lack of prosecution, pursuant to Federal Rule of Civil Procedure 41(b), and for failure to comply with discovery requests pursuant to Federal Rule of Civil Procedure 37(b)(2)(c). (Docket No. 87, dated July 31, 2009.) That motion was joined by co-defendant Banco Popular on August 3, 2009. (Docket No. 88.) On August 7, 2009, plaintiffs filed a motion for voluntary dismissal with prejudice as to defendant Banco Popular and Alicia Rodríguez (Docket No. 89); the claims against defendant Zeno-Santiago remain.¹

¹ Defendant Leslie Zeno-Santiago filed a motion for summary judgment on August 7, 2009. (Docket No. 92.) On September 3, he filed certified translations of exhibits to that motion. As of this writing, the motion for summary judgment is unopposed and subject of another report and recommendation.

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3 Based on the arguments and facts set forth by the remaining defendant, it
4 is my recommendation that the motion to dismiss for lack of prosecution be
5 GRANTED. While I discuss the law related to involuntary dismissal, and consider
6 that the case need not necessarily be dismissed for lack of prosecution, the
7 motion remains unopposed and there is no hint in the record that plaintiffs intend
8 to oppose the same, just as plaintiffs have failed to oppose the motion for
9 summary judgment. Their opposition to the present motion under consideration
10 was due on August 17, 2009. Plaintiffs moved for an extension of time, until
11 September 6, 2009, to oppose this motion. (Docket No. 99, dated August 17,
12 2009.) On August 23, 2009, the court denied the motion as moot (in view of the
13 announcement that the much sought after witness Eddie Céspedes would not be
14 testifying and thus would not be deposed.) This does not excuse plaintiffs from
15 opposing the motion, just as the court's order does not invite the conclusion that
16 the motion for involuntary dismissal will be denied. Indeed, they are deemed to
17 have waived objection to the motion. See Local Rules of the United States District
18 Court for the District of Puerto Rico, Rule 7.1(b) (2004); Colón Vázquez v. El San
19 Juan Hotel & Casino, 483 F. Supp. 2d 147, 152 (D.P.R. 2007).

20 I. FACTUAL AND PROCEDURAL BACKGROUND

21 On May 9, 2007, plaintiffs filed a complaint for civil rights violations based
22 upon unlawful arrest and search, and also invoked the court's supplemental
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3 jurisdiction based on state law tort claims, against Banco Popular de Puerto Rico,
4 Angelo Vidot (branch manager), Sergeant Leslie Zeno-Santiago, Sergeant Torres,
5 Officer Ramos, and two Doe defendants. (Docket No. 3.) Plaintiff Velázquez-de-
6 Jesús alleges that on May 8, 2009, while he was at Banco Popular to make a
7 deposit, a bank employee called police and reported that plaintiff was planning to
8 rob the bank. (Docket No. 39-2, at 3, ¶¶ 11-17.) Plaintiff alleges that the police
9 subsequently unlawfully arrested and searched him without justification. (Id. ¶
10 15.) The other plaintiffs, Gian Carlos Velázquez-Barroso, Gloriana Velázquez-
11 Barroso, Glorily Barroso-Muñoz, Ubaldo Velázquez-Rivera are all family members
12 of Carlos Iván Velázquez-de-Jesús, and all allege that they suffered emotional
13 distress and damages as a result of the alleged unlawful arrest suffered by plaintiff
14 Carlos Iván Velázquez-de-Jesús.

15 On October 9, 2008, plaintiffs moved to voluntarily dismiss their claims
16 against defendant Angelo Vidot (Docket No. 30), defendant John Doe (Docket No.
17 32), defendant Robert Doe (Docket No. 33), and defendant Ramos (Docket No.
18 38). The complaint was amended on February 13, 2009, to name one of the Doe
19 defendants, specifically Mrs. Carmen Alicia Rodríguez (Banco Popular employee).
20 (Docket No. 39; Docket No. 64, granting motion to amend.) Defendant Torres
21 was dismissed on defendant's motion by way of opinion and order of March 13,
22 2009. (Docket No. 49.) Plaintiffs then moved to voluntarily dismiss Banco
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Popular and Carmen Alicia Rodríguez on August 7, 2009. (Docket No. 89.) Thus one defendant remains.

II. DISCUSSION

The motion to dismiss is based on four contentions related to discovery:

1) Failure of plaintiffs' witness, Eddie Céspedes, to appear for deposition on two separate occasions. On one of these occasions, defendants incurred reporter and interpreter expenses. (Docket No. 87, at 3-4, ¶ 10-12.) In the event that the case is not dismissed, defendants request the court to exclude the testimony of this witness and that plaintiffs bear the costs of the interpreter and court reporter. (Docket No. 87, at 8-9, ¶ 2g, ¶ 2h.) This argument has been rendered moot by plaintiffs' announcement that they would forego the testimony of this witness. (Docket No. 100.)

2) Failure of plaintiffs to produce documents requested at depositions; the requests were made June 2, 2009 and May 27, 2009. (Docket No. 87, at 3, ¶ 7.)

3) Plaintiffs' failure to respond to defendants' first set of interrogatories and request for production until March 2, 2009, approximately six and a half months after those requests were sent. (Docket No. 87, at 2, ¶ 3-4).

4) Discovery closed on July 24, 2009 and no extension was requested by plaintiffs, yet plaintiffs still have not produced certain requested documents. (Docket No. 87, at 1-2, ¶¶ 1 & 5.) Defendant's original interrogatories and

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3 production request was made to plaintiffs on August 15, 2008 (Docket No. 87-2),
 4 and answers were mailed on February 26, 2009. (Docket No. 87, at 2, ¶ 4.)

6 INVOLUNTARILY DISMISSAL

7 "Dismissal *with prejudice* is a 'harsh sanction,' Richman v. Gen. Motors
 8 Corp., 437 F.2d 196, 199 (1st Cir. 1971), which 'should be employed only when
 9 a plaintiff's misconduct has been extreme,' Figueroa Ruiz v. Alegría, 896 F.2d 645,
 10 647 (1st Cir. 1990), and 'only after the district court has determined "that none
 11 of the lesser sanctions available to it would truly be appropriate,'" Enlace Mercantil
 12 Int'l, Inc. v. Senior Indus., Inc., 848 F.2d 315, 317 (1st Cir. 1988)." Estate of
 13 Solís-Rivera v. United States, 993 F.2d 1, 2 (1st Cir. 1993). There is a "strong
 14 policy favoring the disposition of cases on the merits." Velázquez-Rivera v. Sea-
 15 Land Serv., Inc., 920 F.2d 1072, 1075 (1st Cir. 1990) (quoting Figueroa Ruiz v.
 16 Alegría, 896 F.2d at 647 (quoting Zavala Santiago v. González Rivera, 553 F.2d
 17 710, 712 (1st Cir. 1977)). However, there are times when dismissal is warranted.
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21 A. Dismissal for Failure to Prosecute, Pursuant to
 22 Federal Rule of Civil Procedure 41(b)

23 Federal Rule of Civil Procedure 41(b) states:

24 If the plaintiff fails to prosecute or to comply with these
 25 rules or a court order, a defendant may move to dismiss
 26 the action or any claim against it. Unless the dismissal
 27 order states otherwise, a dismissal under this subdivision
 28 (b) and any dismissal not under this rule--except one for
 lack of jurisdiction, improper venue, or failure to join a

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3 party under Rule 19--operates as an adjudication on the
4 merits.

5 Fed. R. Civ. P. 41(b).

6 A motion to dismiss under 41(b) is assessed according to several non-
7 exhaustive factors, including: "the severity of the violation, the legitimacy of the
8 party's excuse, repetition of violations, the deliberateness *vel non* of the
9 misconduct, mitigating excuses, prejudice to the other side and to the operations
10 of the court, and the adequacy of lesser sanctions." Malot v. Dorado Beach
11 Cottages Assocs., 478 F.3d 40, 44 (1st Cir. 2007) (quoting Benítez-García v.
12 González-Vega, 468 F.3d 1, 5 (1st Cir. 2006) (quoting Robson v. Hallenbeck, 81
13 F.3d 1, 2-3 (1st Cir. 1996)). Dismissal for failure to prosecute, specifically for
14 failing to comply with discovery orders, is appropriate where the behavior of
15 plaintiff's counsel had been found by the district court to have "amounted to willful
16 misconduct . . . and constituted 'a willful dereliction of counsel's responsibility both
17 to this court and to defendants.'" Damiani v. Rhode Island Hosp., 704 F.2d 12,
18 14-15 (1st Cir. 1983). Abhorrent misconduct and/or a pattern of disobedience are
19 needed in order to grant dismissal for failure to prosecute. See Santiago-Díaz v.
20 Laboratorio Clínico y de Referencia del Este, 456 F.3d 272, 274 (1st Cir. 2006)
21 (dismissal affirmed, where district court cited "plaintiff's persistent flouting of
22 court orders and rules"); Capó v. United States, 7 F.3d 283, 284 (1st Cir. 1993)
23 (dismissal affirmed where plaintiffs maintained a "consistent failure to diligently
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3 prosecute their claims despite the specific deadlines set by the Court to respond
4 to interrogatories and furnish discovery related to expert witnesses.”)

6 Additionally, the court should consider whether the party in question
7 received warnings about the consequences of his/her failure to prosecute or
8 disobedience of court orders. In Pomales v. Celulares Telefónica, Inc., 342 F.3d
9 44, 49 (1st Cir. 2003), the court made the following comparisons to other cases
10 where dismissal with prejudice was justified:

12 See, e.g., Cintrón-Lorenzo v. Departamento de Asuntos
13 del Consumidor, 312 F.3d 522, 526 (1st Cir. 2002)
14 (protracted noncompliance with court orders, “in the
15 teeth of explicit warnings,” justified dismissal with
16 prejudice); Chamorro [v. Puerto Rican Cars, Inc., 304
17 F.3d 1,] 4-5 [(1st Cir. 2002)] (dismissal justified where
18 the plaintiff, despite being “suitably forewarned,”
19 nevertheless disobeyed a court order). . . . See
Velázquez-Rivera [v. Sea-Land Serv., Inc.], 920 F.2d at
1078 (emphasizing the lack of fair warning to the plaintiff
in reversing district court’s dismissal for failure to
prosecute).

20 Id. at 50.

21 Dismissal for failure to prosecute is a sanction “reserved for cases of
22 ‘extremely protracted inaction (measured in years), disobedience of court orders,
23 ignorance of warnings, contumacious conduct, or some other aggravating
24 circumstance.’” Benítez-García v. González-Vega, 468 F.3d at 4 (quoting Cosme
25 Nieves v. Deshler, 826 F.2d 1, 2 (1st Cir. 1987)). For the amount of time
26 considered protracted for purposes of dismissal for failure to prosecute,
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3 López-González v. Municipality of Comerío, 404 F.3d 548, 555 (1st Cir. 2005) is
4 illustrative. There the court noted,

6 plaintiffs not only hindered the progress of the original §
7 1983 action by repeatedly disobeying court orders
8 without explanation, but they waited nearly one year
9 after dismissal (and almost three years after the alleged
10 firings) to file the very same complaint the first district
11 judge had already determined to be inadequate. To
12 permit such flagrant and abusive delay in these
13 circumstances would disturb any peace of mind
14 defendants possessed after dismissal of the original
15 action.

16 "Prior to choosing the harsh sanction of dismissal, a district court should
17 consider the 'broad panoply of lesser sanctions available to it,' such as 'contempt,
18 fines, conditional orders of dismissal, etc.'" Crossman v. Raytheon Long Term
19 Disability Plan, 316 F.3d 36, 39-40 (1st Cir. 2002) (quoting Richman v. Gen.
20 Motors Corp., 437 F.2d at 199 [n.4]).

21 B. Dismissal For Failure to Comply with Discovery,
22 Pursuant to Federal Rule of Civil Procedure 37(b)(2)(A)

23 The consequences for failure to comply with a court order regarding
24 discovery allow the court to "issue further just orders." Fed. R. Civ. P.
25 37(b)(2)(A). Several consequences are named in the rule, including, "striking
26 pleading in whole or in part; . . . dismissing the action or proceeding in whole or
27 in part; . . . treating as contempt of court the failure to obey any order. . . ." Fed. R. Civ. P. 37(b)(2)(A)(iii), (v), (vii).

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3 Although there is no rule or standard which requires a court to impose
4 sanctions other than dismissal before levying that harshest sanction, there has
5 been no instance in this circuit in which a dismissal with prejudice for failure to
6 prosecute has been upheld based on a single instance of noncompliance with a
7 discovery order. Malot v. Dorado Beach Cottages Assocs., 478 F.3d at 44 (citing
8 Benítez-García v. González-Vega, 468 F.3d at 5). As with Rule 41 dismissals,
9 dismissal for violation of discovery orders usually occurs when counsel have
10 previously been explicitly warned about the consequences of non-compliance.
11 (Damiani v. Rhode Island Hosp., 704 F.2d at 14, where two hearings were held
12 on dismissal for violation of discovery order, and "the judge expressed his
13 reluctance to 'seeing a client just knocked out of court because of what has
14 happened in the pre-trial stage . . . [But] [m]aybe we have reached the point
15 where we have got to start thinking in such drastic terms.'"); see also Nat'l
16 Hockey League v. Metro. Hockey Club, 427 U.S. 639, 640-41 (1976), affirming a
17 district court's dismissal of a complaint where for seventeen months, despite
18 "several admonitions by the Court," and "in the face of warnings that their failure
19 to provide certain information could result in the imposition of [sanctions] under
20 Fed. R. Civ. P. 37," plaintiffs did not answer interrogatories or produce requested
21 documents. "Ordinarily, the plaintiff is given an opportunity to explain the default
22 or argue for a lesser penalty; but again there is no mechanical rule." Robson v.
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3 Hallenbeck, 81 F.3d at 3 (citing Link v. Wabash R. Co., 370 U.S. 626, 632
4 (1962)).

6 The first three of these violations, according to defendants, illustrate
7 plaintiffs' lack of prosecution of the case that merits dismissal under Federal Rule
8 of Civil Procedure Rule 41. The fourth is a violation of a court order, which merits
9 dismissal under Rule 41 but also Rule 37(b), "Failure to Comply with a Court
10 Order" relating to discovery.

12 I cannot assess the adequacy of plaintiffs' reasons for delay because their
13 opposition to the motion to dismiss has not been filed. As to the four specified
14 factors defendants list as grounds for dismissal, all factual allegations appear true
15 based on the record. Plaintiffs have not previously been warned nor chastised by
16 the court for dilatory tactics, disobedience, or the consequences thereof except
17 for an order to show cause which was scheduled for August 20, 2009 and which
18 setting was aborted, its need having been overcome by ensuing events. (Docket
20 Nos. 87, 97, 99, 100.) Generally, such warnings are almost a prerequisite to
21 dismissal for failure to prosecute. (See discussion above citing Pomales v.
22 Celulares Telefónica, Inc., 342 F.3d at 49-50; Cintrón-Lorenzo v. Departamento
23 de Asuntos del Consumidor, 312 F.3d at 526; Chamorro v. Puerto Rican Cars,
25 Inc., 304 F.3d at 4-5; Velázquez-Rivera v. Sea-Land Serv., 920 F.2d at 1078).
27 However, failure to oppose this motion reflects a degree of inertia and indifference
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3 that invites dismissal, particularly when other dispositive motions have been
4 unopposed, in combination with the motions for voluntary dismissal. As of the
5 filing of the dispositive motion, 64 days had passed after the last discovery
6 request, with neither production nor request for an extension coming from the
7 plaintiffs. Plaintiffs' response to the motion was to announce excluding the
8 witness Eddie Céspedes, an alternate remedy sought by the defendant. Thus, I
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10 recommend that the motion to dismiss for lack of prosecution be GRANTED.
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III. CONCLUSION

13 Based on the arguments and evidence presented by the remaining
14 defendant, and the lack of opposition by the plaintiffs, I recommend that
15 defendants' motion for dismissal for failure to prosecute be GRANTED.
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17 Under the provisions of Rule 72(d), Local Rules, District of Puerto Rico, any
18 party who objects to this report and recommendation must file a written objection
19 thereto with the Clerk of this Court within ten (10) days of the party's receipt of
20 this report and recommendation. The written objections must specifically identify
21 the portion of the recommendation, or report to which objection is made and the
22 basis for such objections. Failure to comply with this rule precludes further
23 appellate review. See Thomas v. Arn, 474 U.S. 140, 155 (1985); Davet v.
24 Maccorone, 973 F.2d 22, 30-31 (1st Cir. 1992); Paterson-Leitch Co. v. Mass. Mun.
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26 Wholesale Elec. Co., 840 F.2d 985 (1st Cir. 1988); Borden v. Sec'y of Health &

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Human Servs., 836 F.2d 4, 6 (1st Cir. 1987); Scott v. Schweiker, 702 F.2d 13, 14
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(1st Cir. 1983); United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982);
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Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980).

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At San Juan, Puerto Rico, this 8th day of September, 2009.

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S/ JUSTO ARENAS
10 Chief United States Magistrate Judge

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